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JOSEPH F. SPANIOLO, JR.
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NO. 89-897

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KENNETH C. GRIMES
PETITIONER

VERSUS

LOUISVILLE AND NASHVILLE R. CO.
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO RESPONDENTS
MOTION TO DISMISS

Date:
January 8, 1990

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JURISDICTIONAL STATEMENT

Jurisdiction is funded upon the parties agreement to follow the Railway Labor Act. The Railway Labor Act at 45 USCS 153 First (P) Allows an agrieved party to file suit in the District Court of his county. This suit was initiated by complaint on June 11, 1981. Following a final appealable decision of September 14, 1984. The Appellant initiated appeal by filing notice on 10/12/84. As a matter of right under 28 USCS 1254, 1291 to the Seventh Circuit Court of Appeals, the cause was docketed in the Court of Appeals as No. 84-2749. On June 12, 1985 the Court of Appeals rendered its decision. A request for rehearing was denied July 25, 1985, thereafter Appellant sought on October 22, 1985 a Writ of Certiorari in this Court, under Cause No. 85-1711. On June 2, 1986 this Court denied the request for a Writ of Certiorari. On June 11, 1987 Appellant timely filed a motion in the District Court. On 9/15/87, the District Court denied the motion



to confirm and dismissed the proceedings with prejudice. On 2/17/88, the District Court denied Appellant's motion to vacate. On 2/26/88, Notice of Appeal was filed. This case was appealed pursuant to the agreement which provides for appeal of the District Courts decision by way of The Railway Labor Act 45 USCS 151 et, seq. to § 153 First (p), which allow's for appeal under 28 USCS 1254, 1291. This case was then docketed in the Seventh Circuit Court of Appeals under Docket No. 88-1381. The three judge panel decision affirming the District Courts judgment of the United States Court of Appeals for the Seventh Circuit is dated January 27, 1989. Petitioner filed a petition for panel rehearing on February 9, 1989. The petition for a panel rehearing was denied on September 6, 1989. The petition is timely having been filed within the ninety (90) days of this subsequent judgment Jurisdiction is present under 28 USC § § 1254, 1291.



SUMMARY OF ARGUMENT

Pursuant to the respondent L & N's Motion to Dismiss filed December 28, 1989, respondent argues that this Courts order issued under Cause No. 85-1711 was resjudicata for the same case under Cause No. 89-897. Implicit in this argument is the notion that denial of a Writ of Certiorari was an expression of opinion upon the merits of this case. This contention is groundless due to the fact that (1) in this-proceeding under Cause No. 85-1711 the District Court held jurisdiction to confirm the award, and (2) certiorari was denied, there was no review. Therefore, this Motion to Dismiss should be denied.

ARGUMENT

The cause numbers issued in this proceeding 85-1711 and now 89-897 are founded upon the same complaint, (R-181-206). Jurisdiction was acquired from the Agreement.(Exhibit (A) p. 20 Rule 33(a)). It was agreed to follow the Railway Labor Act, 45 USC 151 et. seq., section 153 First (p) provides for suit and Appeal of



the District Court's decision under 28 USCS 1254, 1291 (R 100-101).

This single proceeding had some of the issue ruled upon February 10, 1984. (R 55-92) A retaliation claim was held over for trial on July 26, 1984. On September 14, 1984 the District Court entered it's judgment on the retaliation claim. (R. 36-51) The District Court's judgment was silent on the issue of confirming the award. (R 55-92 and 36-51). The Appellant appealed from this decision, filing notice on 10/12/84. (R. 34) Appeal was initiated as a matter of right pursuant to the parties agreement. (Exhibit A Rule 33a) Appeal followed 28 USCS 1254, 1291. Following the Court of Appeals decision which affirmed the District Court's decision and waived the enforcement issue as it applied to reversal of the District Court's decision, the court entered a denial of rehearing July 25, 1985 (R. 30), the Appellant appealed to this Court where the cause was assigned Docket No. 85-1711. On June 2, 1986 this Court denied certiorari. (R. 28)



Certiorari was denied, under the presents of this fact. The District Court was silent on the issue of confirming the award. This silence meant that the Court (1) did not pass upon the issue of confirming the award and (R55-92, 36,51), (2) without passing upon the award it never relinquished it's jurisdiction to confirm the award. (R. 109) In view of the above facts the respondent has implied that denial of a Writ of Certiorari, means the case was reviewed on the merits by this Court. If this Court had decided to confirm the award, it would have made it's judgment without expressly stating so in it's order. (See R. 28) Moreover, this action would have occurred without the District Court in accordance to it's standards believing a proper motion had been put before it. Denial of confirmation by this Court under Cause No. 85-1711 pursuant to the respondents contention, would be a final judgment on confirmation of the award. The Supreme Court as a Court of Appeals would be in contravention of its own decisions.



This Court has held that "the Appeals Court may not grant a final judgment in favor of a party who failed to so move." In this unanimous reversal, this Court further held: "such a circuitous method of determining the issue would present the question initially to the Appellate Court, when the primary discretionary responsibility for it's decision rest in the District Court, "(Johnson v. New York N.H. & H.R. Co., 1952, 344 U.S. 48, 50, 73 S. Ct. 125, 97 L. Ed. 77. Cone v. West Virginia Pulp and Paper Co.(1947) 330 U.S. 212, 91 L Ed., 849 67 S. Ct. 752).

This Court has also held that an Appeals Court "has no power to order such a judgment." (Globe Liquor Co. v. San Roman (1948) 332 U.S. 571, 92 L. Ed. 177, 68 S. Ct. 246, rel den 333 U.S. 830, 92 L. Ed. 1115, 68 S. Ct. 450.

Moreover, the District Court would have been in a better position to judge the credibility of the witness. Other Supreme Court opinions have in reference to the significance of a denial of certiorari have held in contrast



to the argument of the respondent that: A "refusal of the application for a Writ of Certiorari is no case equivalent to affirmance of decree that is sought to be reviewed."¹ That "denial by the Supreme Court of the United States of Writ of Certiorari to review judgment imports no expression of opinion upon merits of the case,"² and also "denial of a petition for certiorari without more"---- (Note: At R. 28 there is no express statement denying confirmation of the award)-----"has no significance as a ruling, that explicit statement of reason for denial means what it says."³ It does not mean the merits were reviewed as contended by the respondent. But, most important this case as docketed under 89-897, "Previous denials of certiorari by the Supreme Court do not foreclose it from granting appropriate relief."⁴

¹Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (1916) 240 US 251, 60 L. Ed. 629, 36 S. Ct. 269.

²Polites v. United States (1960) 364 US 426, 5 L.Ed. 2d 173, S. Ct. 202, 3 FR Serv. 2d 1021.

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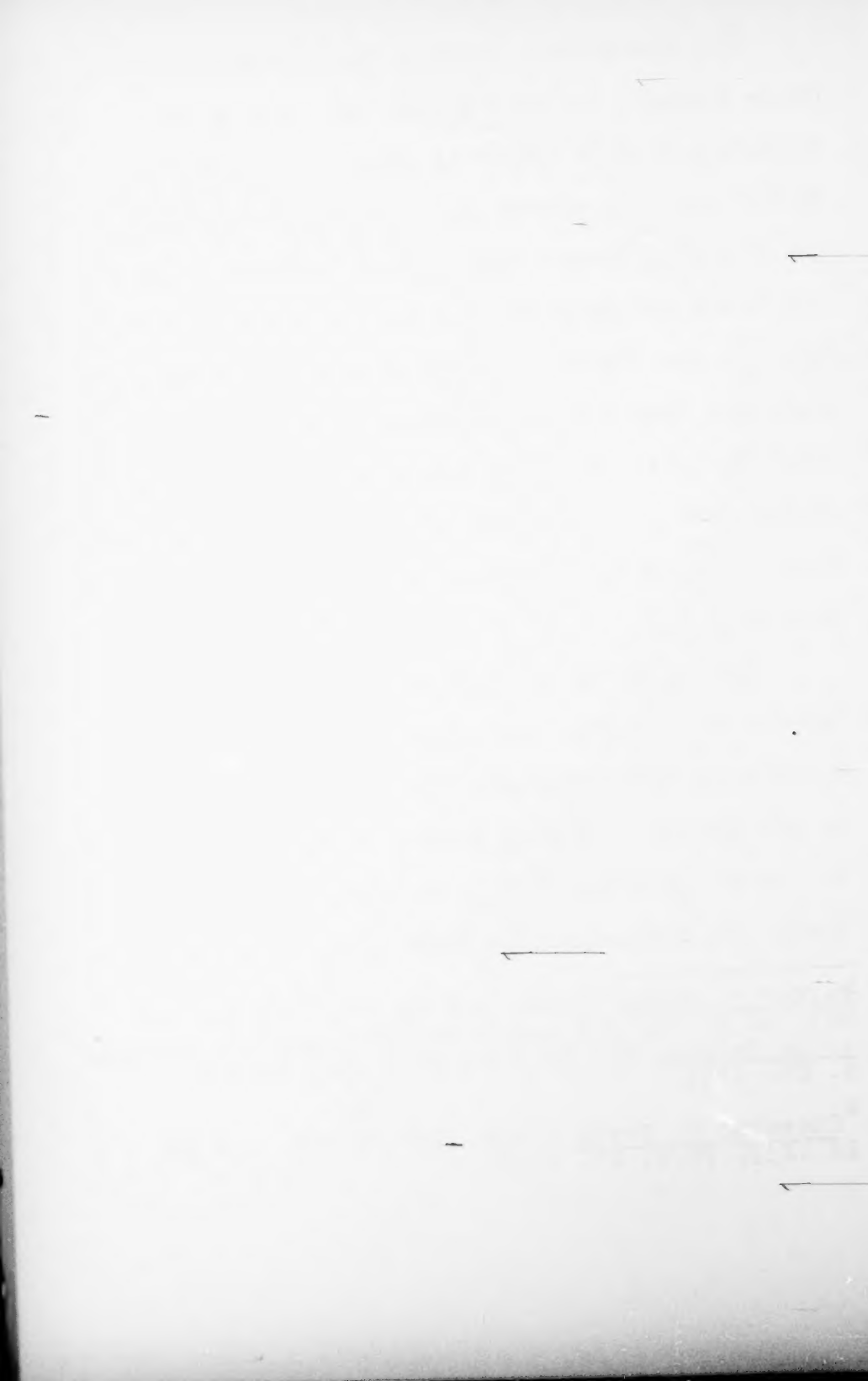


The difference between the two different cause numbers in this single proceeding as docketed in this Court is that: Cause No. 89-897 is: (1) not an appeal from silence on the District Court judgment of 9/15/87 as to the issue of confirmation of the award. (R 18-25) (2) the District Court entered it's decision and "Expressly" dismissed the motion to confirm. (R. 21) (3) the District Court relinquished jurisdiction. (R. 24 line 13) (4) The Court of Appeals affirmed the District Courts decision.

The issue to confirm the award is proper, before this Court. The Appellants rights are "threatened with irretrievable loss if review is postponed." (United States v. Mellon Bank, NA (1976, CA 3 Pa) 545 F. 2d 869, 77-1 USTC 9103. In comparison to this case, it is held

³Parker v. Ellis (1960) 362 US 574, 4 L Ed. 2d 963, 80 S. Ct. 909 ovrl'd on other grounds Carafas v. La Vallee, 391 US 234, 20 L. Ed. 2d 554, 88 S. Ct. 1556.

⁴Chessman v. Teets (1957) 354 US 156, 1 L Ed. 2d 1253, 77 S. Ct. 1127.



that "certiorari will be granted." (Reed & Martin Inc. v. Westinghouse Electric Corp. (1971) CA 2 NY) 439 R. 2d 1268, 14 FR Serv. 2d 1482). A case where there is at least three other similar cases ruled on by the Supreme Court is: (Murray Oil Products Co. v. Mitsui & Co. (1944, CA a NY) 146 Fd 381 (disproved on other grounds Bernhardt v. Polygraphic Co. of America, 350 US 198, 100 L Ed. 199, 76 S. Ct. 273, 29 CCH LC 69689, on remand (CA 2 VT) 235 F 2d 209 31 CCH LC 70272) as stated in Drayer v. Krasner (CA 2 NY) 572 F 2d 348, CCN Fed. Secur L. Rep. 96299, 1979 2 CCA Trade Cases 62848 Cert. Den 436 U.S. 948, 56 L. Ed. 2d 791, 98 S. Ct. 2855).

Other reasons that require plenary consideration and should not be dismissed on respondents motion. (I) The Court of Appeals has sanctioned. A departure from the judicial proceeding by a lower court. (II) The District Courts silence as to equity made no distinction between law and equity, which violated Art. III § 2 of the Constitution, and the Seventh Amendment.



The Court of Appeals affirmed the District Courts decision and was also silent on the issue of equity extending the constitutional violation to the Court of Appeals decision .

(III) That rights in good faith agreements should be upheld by the judicial process not abolished, any other view of NRAB awards and collective bargaining agreements is to do injustice to the clear intent of Congress. It would defeat the object of the underlying legislation, nullify the Railway Labor Act and make arbitration proceedings a farce, namely by (1) excusing the defendant from a duty imposed by binding arbitration and (2) render the remedy under statute and agreement as useless. (IV) The petitioner has exhausted all appeals, his rights will be irretrievably lost if review is postponed and that adequate relief cannot be had in any other forum from any other Court, and that these are present exceptional circumstances warranting the exercise of this Courts supervisory and discretionary powers.

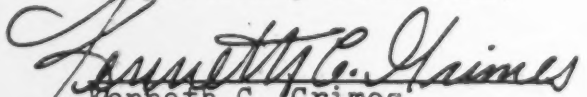


CONCLUSION

Contrary to the respondents contention this case under Cause No. 85-1711 was not reviewed on the merits.

Wherefore, the Appellant prays this Court will deny the motion by the respondent and provide the relief sought by the Appellant in his petition for Writ of Certiorari.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Kenneth C. Grimes". The signature is written in dark ink and is positioned above the printed name and address.

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IN THE SUPREME COURT OF THE UNITED STATES

Kenneth C. Grimes
Petitioner-Appellant

vs.

Cause No. 89-897

Louisville & Nashville R.Co.
Respondent-Appellee

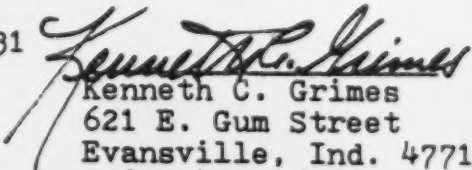
CERTIFICATE OF SERVICE

The undersigned, Counselor Pro Se, hereby certifies that he caused to be mailed postage prepaid, First Class or personally served on this 8th day of January 1990, the following copies of this brief in response to a Motion to Dismiss by respondent.

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